A Mediation Profession in Australia: An Improved Framework for Mediation Ethics

Rachael Field*

Introduction

This article considers the notion of a mediation 'profession' in Australia, and assesses the possibility of a greater acceptance of mediation as a nascent profession in its own right. The article is particularly concerned with the connection between conceptualizing mediation as a profession, and establishing a more sophisticated framework for ethical practice in mediation. The consideration of these issues works from the basis that the legitimacy of mediation rests on a strong ethical paradigm. The article argues that the strength of ethics in mediation will be enhanced if mediation practice is recognised as an independent professional field of endeavour, a new profession, as opposed to merely an industry or adjunct area of practice.

1. An Australian Mediation "Profession" as a Framework for Ethics

Ethical standards and practice are critical to the legitimacy of mediation as an appropriate, additional dispute resolution process. If ethical standards are not effectively maintained, public confidence in the independence and trustworthiness of mediators will erode and the administration of informal justice will be undermined.[1] Therefore, the existence and efficacy of appropriate ethics in mediation is critical.[2] And yet, currently in Australia, mediation ethics can be said to be little more than aspirational. That is, current ethical codes are stated in broad, generic terms, they have no universal acceptance or application, and are not enforced. The

* Rachael M Field, BA/LLB(Hons)(ANU), LLM(Hons)(QUT), Senior Lecturer, Law School, Faculty of Law, Queensland University of Technology, Brisbane, Australia. Many thanks to Professor Terry Carney and Professor Hilary Astor of the University of Sydney, and Kathy Douglas of RMIT for their invaluable comments on earlier drafts.

1 This is a paraphrase of Justice Thomas' comments about judicial ethics – Thomas, JB *Judicial Ethics in Australia*, 2nd ed, (LBC Information Services Sydney, 1997) at 9.

2 Menkel-Meadow C, "Ethics in Alternative Dispute Resolution: New Issues, No Answers from the Adversary Conception of Lawyers' Responsibilities" (1997) 38(2) *South Texas Law Review* 407 at 419.

implementation of ethical practice in mediation, then, depends largely on the personal traits, moral persona and value systems of individual practitioners.

As Justice Thomas has said "the term 'ethics', as understood in the practical sense, commonly refers to a collection of rules or standards of conduct expected of a particular professional group."[3] One of the purposes of such ethical standards, at a basic level, is to provide a quality benchmark against which a professional practitioner's conduct can be measured – so that in the event that their practice departs "to a sufficiently marked degree" from the standards, that person can be excluded from their profession.[4] There are significant factors implicit in a profession's power to exclude members in such a way. These include: "ownership of a field of knowledge, autonomy over practices, control over entry and credentials, state recognition, and social status."[5]

Ethics are clearly central to the efficacy of a professional group. In my view the interconnection between a profession and ethics can also be considered in another way. That is, where a field of endeavour or industry of practice starts to take on the critical elements of a profession, then this provides both an imperative and a framework for a more sophisticated approach to ethics in the practice of that endeavour or industry. In other words, if mediation is considered a nascent profession, then the necessary environment exists for the development and enforcement of a higher level of ethical standards in mediation practice.

The development of a stronger ethical paradigm for Australian mediation practice is critical. This is not least because the notion of neutrality is fast losing its capacity to provide the legitimacy to the process that in the past has anchored its acceptance as an alternative and additional approach to dispute resolution.[6] It follows that if recognising mediation as a profession will facilitate and promote a more profound

---

[3] Thomas, n 1 at 9.

[4] Thomas, n 1 at 9.

[5] National Alternative Dispute Resolution Advisory Council, *A Framework for ADR Standards*: *Report to the Commonwealth Attorney-General* (2001) Commonwealth of Australia at 15.

[6] See for example, Field R, "The Theory and Practice of Neutrality in Mediation" (2003) 22(1) *The Arbitrator and Mediator* 79, Astor H, "Rethinking Neutrality: A Theory to Inform Practice – Part I" (2000) 11 *Australian Dispute Resolution Journal* 73 and Astor H, "Mediator Neutrality: Making Sense of Theory and Practice" (2007) 16(2) Social and Legal Studies 221.

commitment to ethics in mediation, then this recognition is something that the mediation community should be looking to promote.

The central consideration of this article, then, is whether it is appropriate, or possible, to think of mediation in Australia as a profession. The National Alternative Dispute Resolution Advisory Council (NADRAC) has commented that "words such as 'profession', 'industry', 'process', or 'social movement'" are all, at least to some extent, inappropriate descriptors for ADR processes; and the use of any one of these words impacts differently on perceptions of standards in relation to practice.[7] Consistent factors that are common to professions include "full-time practitioners with high levels of specialisation and autonomy", and "higher education qualifications, approved by professional associations, along with continuing professional development requirements."[8] These factors are not yet found in mediation.

Professor Boulle has also put the view that in Australia "the indications are that for some time into the future mediation will constitute both a non-professionalised service with community roots and a supplementary service for professions in other disciplines."[9] The basis for this perspective is that mediation fails to satisfy, or at least can only establish a limited claim to, three of the key characteristics that define the traditional professions.[10] These characteristics are said to be: first, "a sustainable claim to exclusive technical competence in a field"; second, "a service ideal to distinguish them from business or commercial activities";[11] and third, "a sense of community."[12] It is also fair to say that there is probably insufficient public recognition of mediation as a profession at this stage; and also, critically, a reluctance amongst mediators themselves to claim that they belong to a 'profession'. As

---

[7] NADRAC, n 5 at 16.
[8] NADRAC, n 5 at 16.
[9] Boulle L, *Mediation: Principles Process, Practice* (Butterworths Australia, 2005) at 328.
[10] Boulle, n 9 at 326-327. For other perspectives on what constitutes a profession see, for example, Scimecca J, "Conflict Resolution in the United States: An Emerging Profession?" in Avruch K, Black P, and Scimecca J (eds) *Conflict Resolution: Cross-Cultural Perspectives* (Greenwood Press New York, 1991).
[11] See also Barker SF, "What is a Profession?" (1992) 1 (1 and 2) *Professional Ethics* 73 and Tidwell A, "It's the Process that Counts: Professionalising Mediation in NSW" (1999) 6(2) *Murdoch University E-Law Journal* 21 at para 20.
[12] Boulle, n 9 at 326 citing Wilensky H, "The Professionalisation of Everyone?" (1964) *The American Journal of Sociology* 137, Sammons J, *Lawyer Professionalism* (Carolina Academic Press Durham N.C, 1988) at 3-12, and Weisbrot D, *Australian Lawyers* (Longman Cheshire Melbourne, 1990) at 4.

Alexander has noted, mediation practice in Australia has been regulated more by "the forces of a free market" than as a profession.[13]

On the basis of these considerations it is possible to quickly answer in the negative the question of whether the practice of mediation in Australia amounts yet to a 'profession' proper.[14] Currently, mediation fails to meet some of the standard tests of a profession, such as control of a field of knowledge, and control over entry to and practice in the field. Further, as was noted above, the standards of practice that do exist are generic and aspirational in nature. They do not apply (and are not accepted) universally. There is also no professional regulatory body that could enforce the standards in any way. This is not the approach that is found in professions.

Below, however, I offer an alternative way to conceptualise a 'profession' that will allow us to recognise mediation as, at least, a nascent profession. Acceptance of this view in the mediation community will establish an important foundational framework to support a more sophisticated approach to ethics in mediation.

Conceptualising mediation as a profession is also potentially the key to achieving recognition of three critical aspects of the process. First, recognition of the expertise involved in the practice of mediation. Second, recognition of the process' legitimacy as a just and appropriate practice in its own right (not just as an alternative to litigation). And finally, recognition of the social and political significance of mediation. The recognition of these things strengthens the imperative to improve mediation ethics.

2. Mediation as a Nascent Profession

The traditional characteristics of professions are a useful starting point in assessing whether or not mediation can be regarded as a developing profession, but they are not determinative. Indeed, it can be said that those characteristics "have been subject to

[13] Alexander N, "What's Law Got to Do With It? Mapping Modern Mediation Movements in Civil and Common Law Jurisdictions" (2001) 13 *Bond Law Review* 335 at 349.
[14] See also, for example, sources cited at notes 15, 16, 17, 41, and 51.

many pressures in contemporary society and the distinction between professions and other occupational practices is less clear than it might have been."[15]

NADRAC, in its 2001 Report, acknowledged that the practice of ADR was moving towards "increased coordination and collaboration to address common challenges and achieve joint objectives."[16] NADRAC's consultations with the ADR 'field' indicated, for example, "that, *'the time for standards has come'*";[17] and it was noted that in the US there was a similar trend towards "institutionalisation, regulation, legalisation, innovation, internationalisation and coordination in ADR."[18] Although these trends were highlighted as remaining at an inconsistent and uneven stage of development, and although they could only be said to be at "an early pioneering phase",[19] NADRAC nevertheless acknowledged "a recurring theme of increased professionalisation in ADR."[20]

This theme is reflected in the relatively common references to a mediation profession in the literature. For example, Cooks and Hale refer to the need for mediators to "recognise their obligation to uphold the ethical codes of their profession."[21] Weidner has commented that "as the profession grew, so did the number of ethical quandaries,"[22] and Wellik refers to the need for the mediation "profession to exist as a cohesive whole with a consistent perspective of ethical standards."[23] Further, in the context of practice in the US, Sherman has noted that "mediators and third-party neutrals in ADR increasingly view themselves as part of a distinct profession."[24] Sherman has also referred to the issue of mediator qualifications as "one other piece of the building block in the ADR profession."[25] Boulle comments, too, that "the

---

15 Boulle, n 9 at 326.
16 NADRAC, n 5 at 15.
17 NADRAC, n 5 at 15.
18 NADRAC, n 5 at 15.
19 NADRAC, n 5 at 15.
20 NADRAC, n 5 at 15.
21 Cooks LM and Hale CL, "The Construction of Ethics in Mediation" (1994) 12(1) *Mediation Quarterly* 55 at 72-73.
22 Weidner L "Model Standards of Conduct for Mediators (2005)" (2005-2006) 21 *Ohio State Journal on Dispute Resolution* 547 at 548.
23 Wellik S, "Ethical Standards for Mediation: Embracing Philosophical Method" (1999) 10 *Australasian Dispute Resolution Journal* 257 at 257.
24 Feerick J, Izumi C, Kovach K, Love L, Moberly R, Riskin L and Sherman S "Symposium: Standards of Professional Conduct in Alternative Dispute Resolution" (1995) 1 *Journal of Dispute Resolution* 95 per Sherman at 98.
25 Feerick et al, n 24 at 98.

development of mediator codes of conduct in Australia has been one indicator of the growing 'professionalisation' of the practice."[26]

The article now turns to arguing that mediation can be said to constitute at least a *nascent* profession. This argument is based on three key attributes of mediation.[27] First, that mediators hold a "fidelity to a particular good"; second, that mediation can be considered a "public office"; and third, that an accreditation system which will establish "fitness for practice" is being developed for mediators.

2.1 A Mediation Profession: Fidelity to the Good of Self-Determination

De Coste has said that "professionals are those who profess 'fidelity to a particular good.'"[28] The 'good' to which he refers is that which "justifies and grounds a profession's institutional existence."[29] It is the base on which the profession's ethical commitments rest, from which the profession's convictions can be identified, and consequently from which the ethical responsibilities and obligations of the professional's role can be derived.[30] In relation to the idea of a professional good it is helpful to consider that the origins of the term 'profession' lie in the Latin root "to profess", and as Rhode has said, in the European tradition, this required members of a profession to declare their commitment to shared ideals.[31]

Establishing that there is a substantive and common good to which mediators profess their commitment is the first step in thinking of mediation as a profession in its own right. This good must ground the very existence of the mediation community, and command consistent and universal loyalty.

It is proposed here that a commitment to party self-determination is the 'justifying good' of the mediation profession; just as, for example, the Rule of Law can be

---

[26] Boulle, n 9 at 481.
[27] These criteria are taken from De Coste FC, "Towards A Comprehensive Theory of Professional Responsibility" (2001) 50 *University of New Brunswick Law Journal* 109.
[28] De Coste, n 27 at 114 referring to Koehn D, *The Ground of Professional Ethics* (Routledge London, 1994) at 178.
[29] De Coste, n 27 at 114.
[30] De Coste, n 27 at 114.
[31] Rhode DL, "Institutionalising Ethics" (1994) 44 *Case Western Reserve Law Review* 665.

argued as the justifying good of the legal profession.[32] This is because it is self-determination that grounds every model of mediation, from the facilitative to the transformative, and even to the evaluative.[33] Whether a mediator controls the process only, offers information, provides a view as to the merits of the parties' arguments or positions, or proffers possible options for consideration, it remains fundamental to any mediation process that it is the parties who determine the consensual resolution of their own dispute. The mediator's role in any of the incarnations of the process can be seen then as preceding the self-determinant decision of the parties.

Self-determination, then, is the core commonly shared ideal of mediators. Self-determination is the key fundamental element of mediation, particularly in terms of validating the process as a legitimate alternative to litigation. Self-determination is at the very centre of mediation practice. Self-determination and its philosophical function in terms of structuring and defining the obligations of mediators is therefore a critical manifestation of a "fidelity to a good" on which a consideration of mediation as a nascent profession can rest.

2.2 A Mediation Profession: Mediation as a 'Public Office'

The second element to the argument that the mediation field can now be recognised as a nascent profession relates to a concept of mediation as a 'public office'. Mediators are agents of dispute resolution and part of a movement of informal dispute resolution that can be considered a public office in its own right. This is an argument that will be clarified with an elaboration of what is meant by 'office'.

As De Coste has said, "all true professions create offices."[34] He explains office as "a position of trust and a warrant of authority, under constituted authority, which has as

---

[32] De Coste, n 27 at 115. See also De Coste FC, *On Coming to Law* (Butterworths Toronto, 2001).

[33] Note that the joint committee that drafted the 1994 Model Standards for Mediators in the US "was unanimous in its decision that self-determination is the most fundamental principle of mediation.": Feerick JD, "Toward Uniform Standards of Conduct for Mediators" (1997) 38 *South Texas Law Review* 455 at 460.

[34] De Coste, n 27 at 117.

its purpose *service to others*."[35] Mediation can well satisfy this definition of 'office' in relation to all three central concepts found in it.

First, mediators can most certainly be described as being 'in a position of trust' in relation to the parties in dispute who are reliant on the mediator's ability and expertise. In particular, the private and confidential nature of mediation heightens the importance of the trust placed by the parties in the mediator. Second, mediators are under a 'warrant of authority' that is given, or in other words 'constituted', by the consensual authority of the parties to the process (and sometimes also by legislation or through the institutions, governments and courts, for example, that provide mediation services). And finally, as a process of dispute resolution that has its roots in the community, mediation has undoubtedly a central purpose of 'service to others'. That is, it is a service to assist parties in dispute to reach a self-determinant outcome. Mediators, then, can be considered to be in a position of public office, and the mediation process can be said to fulfil a necessary element of the notion of a nascent profession.

2.3 A Mediation Profession: Fitness for Office

The third element of the argument that mediation can now be considered a nascent profession is the recent critical development in Australia of a requirement of fitness for office through a national mediator accreditation system.[36] Indeed, the system will require that "in order to be certified by a Recognised Mediator Accreditation Body (RMAB) mediators must be persons who are fit and proper to practice as mediators and have attended an education, training and assessment course."[37]

In May 2006, the 8th National Mediation Conference voted unanimously in support of a draft scheme for a National Mediation Accreditation System. This was a significant development for mediation practitioners in Australia, being the culmination of many

---

[35] De Coste, n 27 at 117 referring to Walzer M, *Spheres of Justice* (Basic Books New York, 1983) at Chapter 5 – 'Office'.

[36] Note that NADRAC's 2004 Discussion Paper *Who Says You're a Mediator? Towards a National System for Accrediting Mediators*, recommended the development of a national accreditation system for mediators: available at www.nadrac.gov.au. See also, for example, Moore CW, "Training Mediators for Family Dispute Resolution" (1983) 2 *Mediation Quarterly* 79.

[37] *Mediator Accreditation in Australia*, in NADRAC, n 5 at 123.

years of consideration and debate about the issues of mediator training and accreditation.[38] Importantly, the acceptance of an accreditation regime for mediators has created a way forward for considering mediation to be a nascent profession on the basis that it is working towards ensuring that its practitioners are 'fit for their office'.

The accreditation system's development began in earnest at a plenary workshop at the 7th National Mediation Conference held in Darwin on 2 July 2004. A Committee was then established to further the development of the accreditation system,[39] and since the unanimous acceptance of that Committee's draft proposal in 2006, the system has been in an initial 2 year implementation phase. An evaluation and report on the system's implementation will be presented at the 9th National Mediation Conference in 2008.[40] Much will rest on the results of the evaluation and report, and on the Conference's reaction to those results.

The system will apply only to mediators, and provide for only one level of accreditation at this stage.[41] Under this system, mediators who satisfy the requirements of the National Mediation Standard (NMS) will be accredited.[42] The NMS will enumerate and describe the "knowledge, process competencies, skills and techniques required for accreditation."[43] Required knowledge will include knowledge relating to conflict, when mediation is appropriate, communication and negotiation patterns in conflict, the mediation process, and the role and functions of the mediator, amongst others.[44] Required skills and techniques will include pre-mediation processes such as preparation and intake, the conduct and management of the mediation process, mediator interventions, drafting of mediated agreements and

---

[38] See for example, NSW Law Reform Commission, *Alternative Dispute Resolution: Training and Accreditation of Mediators*, Discussion Paper 21, (October 1989); Attorney-General of Victoria's Working Party on Alternative Dispute Resolution, *Discussion Paper* (June 1990) at 60-78; and Astor H and Chinkin C, *Dispute Resolution in Australia* (Butterworths Sydney, 2002).

[39] This committee was facilitated by Prof Laurence Boulle and the members of the Committee included: Helen Marks, Scott Pettersson, Franca Petrona, Sandra Boyle, Warwick Soden, Mary Walker, Karen Dey, Salli Browning, Gordon Tippett, Robert Crick and Bill Field: *Mediator Accreditation in Australia*, in NADRAC, n 5 at 116.

[40] *Mediator Accreditation in Australia*, in NADRAC, n 5 at 127.

[41] See Part 1 clauses 2, 3 and 4 of the Proposal in *Mediator Accreditation in Australia*, in NADRAC, n 5 at 121.

[42] See Part I clause 1 of the Proposal: *Mediator Accreditation in Australia*, in NADRAC, n 5 at 121.

[43] See Part II clause 2 of the Proposal: *Mediator Accreditation in Australia*, in NADRAC, n 5 at 127 and Annexure A at 128.

[44] See Annexure A (1) of the Proposal: *Mediator Accreditation in Australia*, in NADRAC, n 5 at 128.

protocols for the termination of mediation.[45] Required ethical understanding will relate to conflicts of interest, marketing and advertising, confidentiality, neutrality and impartiality, fiduciary obligations, fairness and equity, and withdrawal from and termination of the mediation process.[46]

The System will also involve a uniform Code of Practice, which will describe "the ethical and professional obligations of mediators" accredited under the NMS.[47] The Code is yet to be "developed by the Implementation Body in the light of existing Australian mediator Codes of Practice."[48] There is therefore, currently, significant potential for the development of a new ethical framework. This framework would be made stronger through acceptance of mediation as a profession in its own right.

The System will be implemented by Recognised Mediator Accreditation Bodies (RMABs).[49] The main function of RMABs will be the accreditation of mediators through a certification process, although they will also be able to provide education and training.[50] The key education, training and assessment requirements for accreditation include a program of a minimum of 40 hours duration,[51] participation and assessment of process competencies in at least six simulated mediation sessions, and completion of a written theory examination of between 45 and 60 minutes.[52] The System also requires continuing professional development of accredited mediators based on a points system.[53] Importantly, "recognition of prior learning and experience will be given on a flexible basis", but there will also be "no automatic 'grandparenting' into the system."[54]

---

[45] Annexure A (2) of the Proposal: *Mediator Accreditation in Australia*, in NADRAC, n 5 at 128.
[46] Annexure A (3) of the Proposal: *Mediator Accreditation in Australia*, in NADRAC, n 5 at 128.
[47] Part II clause 3 of the Proposal: *Mediator Accreditation in Australia*, in NADRAC, n 5 at 121.
[48] Part II clause 3 of the Proposal: *Mediator Accreditation in Australia*, in NADRAC, n 5 at 121.
[49] It is suggested these bodies will include membership associations such as LEADR and IAMA, service providers such as Community Justice Programs and Relationships Australia, Courts and tribunals as well as non-profit associations such as the Victorian ADR Association: see Part III of the Proposal, *Mediator Accreditation in Australia*, in NADRAC n 5 at 122 and footnote 322.
[50] Part IV clause 4 of the Proposal: *Mediator Accreditation in Australia*, in NADRAC, n 5 at 122.
[51] See footnote 329 of the Proposal in *Mediator Accreditation in Australia,* in NADRAC, n 5 at 131: "It was noted during the public consultations that in some overseas countries the education and training requirements range between 150 and 600 hours duration." See also comments in Douglas, K "Mediation Accreditation: Using Online Role-Plays to Teach Theoretical Issues" (2007) 18 *Australasian Dispute Resolution Journal* 92.
[52] Annexure C of the Proposal: *Mediator Accreditation in Australia*, in NADRAC, n 5 at 131.
[53] Part VI and Annexure D of the Proposal, *Mediator Accreditation in Australia*, in NADRAC n 5 at 124 and 132.
[54] Part XI clause 2 of the Proposal: *Mediator Accreditation in Australia*, in NADRAC, n 5 at 126.

Certainly, these aspects of the System, even though voluntary, will much more adequately ensure that accredited mediators are 'fit for their office'. However, perhaps one of the most significant aspects of the System in this regard, is the introduction of formal complaints and disciplinary processes, and de-accreditation where mediators fail to comply with their ongoing requirements under the System.

The RMABs will be responsible for providing procedural frameworks for complaints processes and are required to ensure that they involve "as little technicality and formality as possible," whilst also according procedural fairness to all parties.[55] Assessment of mediator conduct in relation to complaints and grievances will be determined against the mediator Code of Practice, and where a breach of that Code is determined the mediator may be suspended from accreditation on a temporary or permanent basis.[56] A process of automatic de-accreditation will apply to mediators who fail to comply with their ongoing requirements for accreditation.[57]

Despite these critical developments that indicate so strongly a move towards the status of profession for mediation practice, it is notable that the System has been kept voluntary, and there will be no compulsion for mediators to obtain accreditation in order to be able to practice.[58] This decision, it is clear, was based firmly on what was, perhaps, an overcautious response to continuing concerns in the mediation community about "exclusivity", "exclusion", and "over-professionalisation".[59] It also seems grounded in a pre-occupation with distinguishing the System from a licensing arrangement with mandatory pre-requisites that might apply to the practice of a profession.[60]

Nevertheless, the System, inarguably, brings the mediation community (importantly through their own agreement) significantly *closer* to satisfying professional status through an accountable approach to education and competence assurance. Certainly, NADRAC considers that "the best method of ensuring accountability and maintaining

---

55 Part VII clause 2 of the Proposal, *Mediator Accreditation in Australia*, in NADRAC n 5 at 124.
56 Part VII clause 3 of the Proposal: *Mediator Accreditation in Australia*, in NADRAC, n 5 at 124.
57 Part VII clause 4 of the Proposal: *Mediator Accreditation in Australia*, in NADRAC, n 5 at 124.
58 Part I clause 2 of the Proposal, *Mediator Accreditation in Australia*, in NADRAC, n 5 at 121.
59 *Mediator Accreditation in Australia*, in NADRAC, n 5 at 117.
60 *Mediator Accreditation in Australia*, in NADRAC, n 5 footnote 318 at 121.

both the standards of practice and public faith in the ADR process is to have clear, transparent accreditation systems in place, with sanctions for breaches of professional standards."[61] By ensuring that accredited practitioners are 'fit for their office' these developments support an argument that the mediation community is now a nascent profession.

2.4 A Mediation Profession: Existing Codes and Standards

A further indicator that mediation is deserving of the status and descriptor of a nascent profession, is the fact of the existence of ethical codes and standards of practice. This is because "in all professions there are systems for prescribing the limits of professional behaviour and defining ethical standards."[62] It was noted above that mediation codes and standards in Australia remain aspirational, and are not yet adequate to support the practice of mediation as a profession. And yet, as Greenwood has said, the existence of codes of practice and standards is one of the key traits of a profession.[63] Certainly, although the existing codes and standards are not universally accepted or consistently applied, the fact such codes exist at all is, of itself, evidence of the potential for the practice of mediation to be considered a developing or nascent profession.

3. Conclusion

Boulle has commented that "the debate over whether mediation has, or will achieve, professional status has no major implications for its future development but it has some significance for those who provide and use the process." This view does not fully acknowledge the importance of the ethical commitment that goes with the practice of a profession, and it also fails to acknowledge that mediation does raise "distinctive issues of professional conduct that cannot be fully comprehended by the individual codes of professional conduct and responsibility" that exist for other professions.[64]

---

[61] NADRAC, n 5 at 61.
[62] Boulle, n 9 at 481.
[63] Greenwood E, "Attributes of a Profession" in R Pavalko (ed), *Sociological Perspectives on Occupations*, FE Peacock Illinois 1972 at 16.
[64] Sherman, above note 24 at 98.

The argument here is that mediation's status as a profession has significant implications for the future efficacy and acceptance of the process. If mediation is to be able to achieve the necessary levels of accountability and standards of practice that truly legitimise it as a just and appropriate dispute resolution process on its own merits, then it must be recognised as a profession proper, and it must recognise itself as a profession in its own right. The inadequacies of the current ethical paradigm will only be satisfactorily addressed through a recasting and redevelopment of that paradigm as a comprehensively argued and theoretically grounded *professional ethics of mediation.*

Deborah Rhode has said in relation to the legal profession, that "it makes sense to view professionalism not as a fixed ideal, but as an ongoing struggle."[65] De Coste comments on the wisdom of this, noting that "professionalism resides not in some declaration of aspiration, and still less in some hoped-for epiphany, but rather in the prosaic day-to-day decisions which are the stuff and measure of professional life."[66] When considered from the perspective of the day-to-day efficacy of the mediation process, the imperative to develop a more appropriate approach to ethics in mediation takes on an element of urgency. That approach must involve much more than merely the declaration of the ethical aspirations that are the subject of existing codes and standards. It must meet the challenges of the day-to-day realities of the mediation room, and the rigours of the real responsibility that is created by the privilege of the mediator's role.

The practice of mediation is facing a moment of truth.[67] Mediation practitioners in Australia must now consider maturely their identity and their role, and their professional responsibilities and obligations.[68] In recognising mediation as a developing profession, mediation practitioners will lay claim to the good of that which they profess – upholding the fundamental principle of self-determination in

---

[65] Rhode DL, "The Professionalisation Problem" (1998) 39 *William and Mary Law Review* 283 at 325.
[66] De Coste, n 27 at 122.
[67] This phrase in this context was taken from Linowitz, SM, "Moment of Truth for the Legal Profession" (1997) *Wisconsin Law Review* 1221.
[68] McKay comments that antecedent to issues of ethics in mediation "is the basic question of role.": McKay RB, "Ethical Considerations in Alternative Dispute Resolution" (1989) 45 *Arbitration Journal* 15 at 21

dispute resolution. This in turn will provide the foundation for a more comprehensive and satisfactory approach to mediation ethics.